LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 4 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 956

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,

Petitioner,

vs.

WILSON & CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
DAVID R. KENTOFF,
Attorneys for Petitioner.

COTTON, WATT, ROCKLER & JONES,
105 West Adams Street,
Chicago 3, Illinois.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	3
The Decisions Below	4
Reasons for Granting the Writ	6
Conclusion	10
Appendix A—Per Curiam Opinion, January 18, 1965	11
Appendix B—Order entered June 3, 1964	12

CITATIONS.

Independent Petroleum Workers of America v. American Oil Co., 33 L. Ed. 2d 333 (1964) 5, 6, 7, 8

Int'l Tel. & Tel. Corp. v. Local 400, Int'l Union of Electrical Radio & Machine Workers, 286 F. 2d 329 (3rd Cir. 1960) 9

Int'l Union of Elec. Radio & Machine Workers v. Gen'l Elec. Co., 332 F. 2d 485 (2d Cir. 1964) 8

Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 298 F. 2d 644 (2d Cir. 1962) 9

United Steelworkers of America v. American Mfg. Co., 363 U. S. 564 (1960) 6

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U. S. 593 (1960) 6

United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U. S. 574 (1960) 6, 7, 8

Westinghouse Elec. Corp. v. Local 1790, Int'l Ass'n of Machinists, 304 F. 2d 449 (1st Cir. 1962) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. .....

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,

Petitioner,

vs.

WILSON & CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, United Packinghouse, Food and Allied Workers, AFL-CIO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 18, 1965.

OPINIONS BELOW.

The unreported opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is set forth at pages 34-37 of the Brief and Appendix for Plaintiff-Appellant in the Court of Appeals (nine copies of which have been filed with this Court). The per curiam opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition, p. 11, *infra*.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 18, 1965. This Court has jurisdiction to review the judgment by a Writ of Certiorari under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Is it essential to the arbitrability of a grievance complaining of the contracting out of bargaining-unit work that the collective bargaining agreement contain an express prohibition of the practice?

2. Was the employer's refusal to submit the grievance to arbitration a violation of the arbitration provisions of the collective bargaining agreement between the parties?

3. In determining whether a particular grievance falls within a generally-worded "exception clause" in the collective agreement, does a court invade the province of the arbitrator by considering the history of prior bargaining and other extrinsic evidence?

4. Is it necessary for a party seeking arbitration of a grievance to file a separate grievance expressly raising the issue of arbitrability where arbitrability is initially denied by the employer?

STATUTE INVOLVED.

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U. S. C. Section 185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE.

Petitioner, United Packinghouse Food and Allied Workers, AFL-CIO, a labor organization representing employees of the defendant, Wilson & Co., Inc., filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division, to compel the defendant to arbitrate a grievance arising at its plant in Albert Lea, Minnesota, one of the facilities covered by the collective bargaining agreement (App. 3-14). The complaint, filed on March 26, 1963 (App. 1), invoked the jurisdiction of the District Court under Section 301(a) of the Labor-Management Relations Act of 1947, 29 U. S. C. Section 185(a).

The complaint charged that the Company's refusal to arbitrate the grievance was contrary to Sections 124 through 133 of the collective bargaining agreement, which provide a procedure—with arbitration as the final step—for the orderly settlement of disputes between the parties (App. 4-5). The grievance asserted that the Company was improperly "contracting out work that belongs to the bargaining unit of Local #6 and should be done by the members of Local #6," Petitioner's local in Albert Lea (App. 5-6, 15). It requested discontinuance of the practice and the payment of wages lost by employees as a result (App. 15). As alleged in the complaint, the Company, by employing "independent outside maintenance men to perform maintenance work usually performed by members of the bargaining unit at the Albert Lea plant", violated the collective agreement. Specifically, the complaint charged that such contracting out was "in violation of the seniority provisions of the agreement set forth in Sections 82 through 90 inclusive thereof, and, in addition, was a discrimination against certain maintenance employees and a policy undertaken to avoid other provisions of [the] agreement in violation of Section 9 of the agreement" (App. 5-6).

The Company's answer admitted the jurisdiction of the court, the collective bargaining agreement, the filing of the grievance, Petitioner's compliance with the procedural steps prerequisite to arbitration, and the Company's refusal to proceed to arbitration (App. 15). The Company asserted, however, that "the contracting out of work is a function of management vested exclusively in the company". As a result, the Company argued that the grievance "is not arbitrable under the collective bargaining agreement, as evidenced by its terms, by the Plaintiff's unsuccessful attempts to limit the company's established managerial right to contract out work and by the Plaintiff's acquiescence in the exercise of this right by the Defendant over a period of many years" (App. 15-16).

Petitioner filed a motion for summary judgment, supported by an affidavit (App. 17-25). The Company submitted affidavits in opposition which described the maintenance work contracted out in the Albert Lea plant between January 4, 1955 and February 21, 1963, listed the mechanical department employees (among those covered by the collective bargaining agreement) laid off since January 4, 1955, set out a proposal relating to contracting out allegedly made by Petitioner to the Company in 1962, and asserted that, during contract negotiations in two earlier years (1952 and 1960), the Petitioner had tendered clauses, to which the Company refused to agree, that would have prohibited the contracting out of bargaining-unit work (App. 25-32).

THE DECISIONS BELOW.

The trial court denied Petitioner's motion for summary judgment and dismissed the cause (App. 37). In its opinion, the court observed that the arbitrability of the grievance depended on "whether the grievance falls within the clause 'pertaining to matters involved in this agreement'

[in which event the grievance would be arbitrable], or the clause 'incident to the employment relationship' " (App. 35), in which event the grievance would not be arbitrable. The trial court stated that it would be necessary to hear evidence of intent in order to determine which clause applied. It held, however, that the question of whether the grievance was arbitrable was itself an arbitrable issue, which should have been raised by means of a separate grievance (App. 35-36). Thus, the complaint was dismissed on the ground that the Petitioner had failed "to exhaust contractual remedies," since it had failed to file a second, separate grievance, raising the question of the arbitrability of the principal grievance. The trial court stated that the second, subsidiary grievance "most definitely" would be arbitrable (App. 36).

The Court of Appeals, following oral argument on June 3, 1964, noted that the parties had conceded that the issues presented—the arbitrability of a grievance concerning the contracting out of bargaining unit work where the collective bargaining unit contained no express prohibition of the practice—were "substantially the same as certain issues decided by this Court in *Independent Petroleum Workers of America, Inc.* v. *American Oil Co.* . . . On May 18, 1964 the United States Supreme Court granted certiorari in the *Independent Petroleum Workers* case" (Appendix B, p. 12, *infra*). Accordingly, on that date, it entered an order withholding further action in the present case until such time as this Court "acted on the *Independent Petroleum Workers* case". On January 18, 1965, the Court of Appeals affirmed per curiam the District Court judgment of dismissal, stating the following as the basis for its decision (Appendix A, p. 11, *infra*):

> The Supreme Court on certiorari to this Court in *Independent Petroleum Workers of America, Inc.* v. *American Oil Co.*, on November 23, 1964, affirmed this

Court's judgment by an equally divided court. Because of the similarity of issues, the Supreme Court decision in *Independent Petroleum Workers* is determinative of the issue presented in the instant case. On that basis the District Court's judgment of dismissal is affirmed.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals that the grievance filed by Petitioner was not arbitrable is contrary to this Court's decisions in *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960), *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960), and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960), which delineated the boundaries of judicial inquiry in suits to compel arbitration under Section 301(a).

In the present case, the collective bargaining agreement provides for the arbitration of grievances "pertaining to matters involved in [the] agreement" (App. 12). The agreement does not contain a provision expressly prohibiting the Company from contracting out bargaining-unit work.

In the *Warrior* case, this Court had before it the very same issue—the arbitrability of a grievance complaining of the contracting out of bargaining-unit work. As here, the contract in *Warrior* did not expressly prohibit contracting out, nor did it even mention the practice. The grievance and arbitration provisions of the contract in *Warrior* applied in the event of any "differences . . . as to the meaning and application of the provisions of [the] agreement, or should any local trouble of any kind arise . . ." 363 U. S. 574, 576. The contract explicitly *excluded* from arbitration "matters which are strictly a function of management . . ." 363 U. S. 574, 576. In the present case, the contract *does not exclude* from arbitration

matters which are a function of management. Here, Section 126 of the contract provides for the arbitration of grievances "pertaining to matters involved in [the] agreement". Section 131 excludes from arbitration only what are vaguely termed matters "incident to the employment relationship" (App. 12-13).

In the contract in the present case, the arbitration clause is at least as broad as that in *Warrior*, and the exception clause ("matters . . . incident to the employment relationship") is at least as vague. Although neither agreement mentions contracting out, it is plain that a dispute as to contracting out is comprehended by the broad language of both arbitration clauses. As this Court said in *Warrior:* "There was, therefore, a dispute 'as to the meaning and application of the provisions of this Agreement' which the parties had agreed would be determined by arbitration." 363 U. S. 574, 585.

Similarly, in the present case the opposing contentions of the parties raise a dispute as to a matter "involved in the agreement". That dispute is for the arbitrator.

The fact that this Court, by a four-to-four per curiam decision, has affirmed the judgment in *Independent Petroleum Workers of America* v. *American Oil Co.*, 13 L. Ed. 2d 333 (1964), should not militate against granting the writ in the present case. As the Court is well aware, the *Petroleum Workers* case involved not only the issue raised by this Petition, that is, the arbitrability of a contracting-out dispute absent an express contractual prohibition of the practice, but also the question of whether the doctrine of "collateral estoppel" was applicable to deny arbitration in that case, where, in a prior proceeding, the Court of Appeals had denied arbitration. Since this Court's decision in *Petroleum Workers* was not accompanied by an opinion, Petitioner cannot determine on which of the foregoing grounds the decision was based.

2. Realistically, the importance of the issue presented, taken in conjunction with this Court's opinion in *Warrior* and its recent decision in *Petroleum Workers*, justifies and necessitates a clarification of the Court's position respecting the arbitrability of contracting out grievances. In *Warrior* the Court recognized that "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement" (363 U. S. 574, 578), and that "[a]part from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement" (363 U. S. 574, 581). If, by its decision in the *Petroleum Workers* case, the Court has qualified its views as expressed in *Warrior*, such a change in position had best be explained and delineated. If, on the other hand, the teachings and doctrines of the *Warrior* case are still valid, the *Petroleum Workers* case has made it desirable for the Court to reaffirm its views.

3. In addition to its conflict with the principles announced by this Court in the *Steelworkers* trilogy, the decision of the court below is in conflict with decisions of other circuits. For example, in *Westinghouse Elec. Corp.* v. *Local 1790, Int'l Ass'n of Machinists*, 304 F. 2d 449 (1st Cir. 1962), the Court of Appeals for the First Circuit summarily ordered arbitration of a contracting-out grievance where the collective bargaining agreement provided for the arbitration of questions as to the interpretation, application or claimed violations of the agreement. The court could find no difference between the case before it and *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960). In *Int'l Union of Elec. Radio & Machine Workers* v. *Gen'l Elec. Co.*, 332 F. 2d 485 (2d Cir. 1964), the Court of Appeals for the Second Circuit held that a dispute concerning contracting out was arbitrable under

a collective bargaining agreement which provided for arbitration of grievances involving the interpretation or application of a provision of the agreement. The court based its decision on the principle announced in *Warrior* that every grievance is arbitrable unless it is clearly excluded by the terms of the collective agreement. Significantly, the Court of Appeals for the Second Circuit held further that, in determining the arbitrability of a grievance, a court may not consider evidence of prior bargaining on subjects possibly relevant only to the merits of the dispute.

Other cases in which contracting out disputes have been held to be arbitrable, under contractual provisions similar to those contained in the agreement between the parties in this case, are *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 298 F. 2d 644 (2d Cir. 1962), and *Int'l Tel. & Tel. Corp.* v. *Local 400, Int'l Union of Electrical Radio & Machine Workers*, 286 F. 2d 329 (3rd Cir. 1960).

On the basis of the foregoing it is apparent that the Courts of Appeal are in conflict with respect to the arbitrability of contracting out disputes in the absence of express contractual prohibitions of the practice. In order to alleviate the confusion which has been and will be engendered by these conflicting decisions, as well as by this Court's equally-divided affirmance of the *Petroleum Workers* case, it is desirable that the issue again be considered.

CONCLUSION.

On the basis of the foregoing this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
DAVID R. KENTOFF,
Attorneys for Petitioner.

COTTON, WATT, ROCKLER & JONES,
105 West Adams Street,
Chicago 3, Illinois.

APPENDIX A.

(PER CURIAM OPINION, JANUARY 18, 1965.)

Before HASTINGS, *Chief Judge*, MAJOR and SWYGERT, *Circuit Judges*.

PER CURIAM. Plaintiff United Packinghouse, Food and Allied Workers, AFL-CIO brought suit to compel defendant Wilson & Co., Inc., to arbitrate a grievance concerning contracted out work which plaintiff contended belonged to its bargaining unit at defendant's plant at Albert Lea, Minnesota.

Both parties concede that the issue here is substantially the same as that decided by this court in *Independent Petroleum Workers of America, Inc.*, v. *American Oil Co.*, 324 F. 2d 903 (7th Cir. 1963), *cert. granted*, 377 U. S. 930 (May 18, 1964). Following oral argument on June 3, 1964, we ordered that further action "be withheld until the Supreme Court has acted on the *Independant Petroleum Workers'* case."

The Supreme Court on certiorari to this court in *Independent Petroleum Workers of America, Inc.* v. *American Oil Co.*, on November 23, 1964, affirmed this court's judgment by an equally divided Court. Because of the similarity of issues, the Supreme Court decision in *Independent Petroleum Workers* is determinative of the issue presented in the instant case. On that basis the district oourt's judgment of dismissal is affirmed.

APPENDIX B.

(ORDER ENTERED JUNE 3, 1964.)

Oral arguments on this appeal were heard by this Court on June 3, 1964, and the case was taken under consideration. The issues herein are substantially the same as certain issues decided by this Court in *Independent Petroleum Workers* v. *American Oil Co.*, 7 Cir., 324 Fed. 2d 903 (1963). On May 18, 1964 the United States Supreme Court granted certiorari in the Independent Petroleum Workers case.

IT IS ORDERED that further action by this Court on the instant case be withheld until the United States Supreme Court has acted on the Independent Petroleum Workers case, and that the instant case be stricken from the current calendar.

LIBRARY
SUPREME COURT, U. S.

No. 956

Office-Supreme Court, U.S.
FILED
APR 1 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,

Petitioner,

vs.

WILSON & CO., INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

EDWARD M. BULLARD,
CHARLES A. BANE,
PHILIP F. PURCELL,
JAMES E. KNOX, JR.,
72 West Adams Street,
Chicago, Illinois 60603,

FRED C. ASH,
M. LEE BISHOP,
Prudential Plaza,
Chicago, Illinois 60601,
Counsel for Respondent

ISHAM, LINCOLN & BEALE,
Of Counsel.

McCORMICK & HENDERSON INC., CHICAGO, ILL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 956

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,

Petitioner,

vs.

WILSON & CO., INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Petitioner is seeking a court order that respondent must arbitrate a decision to contract out certain work. The collective bargaining agreement provides for discussion of grievances "pertaining to matters involved in this agreement or incident to the employment relationship" but for arbitration of only those grievances pertaining to matters "involved in this agreement" as distinguished from matters "incident to the employment relationship." (App. 12-13.) The question is simply the interpretation of this particular submission provision: Is the matter of contracting out work a matter "involved in this agreement" or a matter "incident to the employment relationship"?

ARGUMENT

This is a routine interpretation case turning on its own unique facts.

The arbitration submission provision in defining arbitrable matters distinguishes between subjects specifically referred to in the collective bargaining agreement and subjects to which the agreement speaks, if at all, only because of the overall nature of the relationship it creates between the parties. None of the provisions of the collective bargaining agreement deal with the subject of contracting out work. (App. 8-11.) Petitioner has never contended otherwise. The grievance it filed over the contracting out did not even mention the agreement or any violation thereof. (App. 19.)

It seems unquestionably clear that the matter of contracting out has been specifically excluded from arbitration as pertaining to a matter "incident to the employment relationship" as opposed to a matter "involved in this agreement."[1] The decision of the Court of Appeals so holding

---

[1] The submission provision of the collective bargaining agreement between General Electric and the Electrical Workers provides for the arbitration of "[t]he claimed violation of a specific provision . . . of the National Agreement . . ." as distinguished from "claims that an allegedly implied or assumed obligation of this National Agreement has been violated." The BNA Labor Relations Reporter in analyzing this provision states: "An example of an assumed 'indirect or implied purpose' that is *not* subject to arbitration as a matter of right is a claim that subcontracting of plant work while bargaining unit employees are on layoff violates the contract provisions on reductions in force and seniority." 54 L.R.R. 117, 146 (Oct. 7, 1963).

is in accord with the decisions of this Court in the "steelworkers trilogy." In *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960), this Court expressly recognized that the courts have "the duty of determining whether the reluctant party has breached his promise to arbitrate[,] [f]or arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Accord, Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers*, 370 U.S. 254, 256 (1962); *Atkinson* v. *Sinclair Ref. Co.*, 370 U.S. 238, 241 (1962).

There is no conflict merely because in *Warrior* a contracting out grievance was found to be arbitrable while here such a grievance was found not to be arbitrable. The submission provision in *Warrior* did not distinguish between matters dealt with expressly and incidentally as does the provision involved here, but encompassed "differences . . . as to the meaning and application of the provisions of this Agreement . . . [and] any local trouble of any kind . . . ." 363 U.S., at 576. In each case, the determination of whether the parties have agreed to submit a particular matter to arbitration must be made on the basis of the particular submission provision before the court. *Compare Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers, supra*, where a claim for damage arising from a strike was held to be arbitrable, *with Atkinson* v. *Sinclair Ref. Co., supra*, where such a claim was held not to be arbitrable. The possibilities of submission are as varied as the particular need and desires of the parties. This case, as do all such cases, turns on its particular facts.[2]

---

[2] The above discussion of the asserted conflict with *Warrior* is equally applicable to the asserted conflict with the decisions of other Courts of Appeals.

CONCLUSION

There are no reasons for review by this Court. The petition for certiorari should be denied.

Respectfully submitted,

EDWARD M. BULLARD
CHARLES A. BANE
PHILIP F. PURCELL
JAMES E. KNOX, JR.
72 West Adams Street,
Chicago, Illinois 60603,

FRED C. ASH
M. LEE BISHOP
Prudential Plaza,
Chicago, Illinois 60601
Counsel for Respondent

ISHAM, LINCOLN & BEALE
Of Counsel
March, 1965

Office-Supreme Court, U.S.
FILED
MAY 21 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 956

UNITED PACKINGHOUSE FOOD AND ALLIED WORKERS, AFL-CIO,

Petitioner,

vs.

WILSON & CO., INC.,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
DAVID R. KENTOFF,
Attorneys for Petitioner.

COTTON, WATT, ROCKLER & JONES,
105 West Adams Street,
Chicago, Illinois 60603.

THE BLAKELY PRINTING COMPANY, CHICAGO 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 956.

UNITED PACKINGHOUSE FOOD AND ALLIED WORKERS, AFL-CIO,

Petitioner,

vs.

WILSON & CO., INC.,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

On April 26, 1965, this Court denied the Petition for Certiorari in this cause. Taken in conjunction with its earlier actions affirming the judgment in *Independent Petroleum Workers of America, Inc.* v. *American Oil Co.*, Case No. 55, This Term, and denying certiorari in *Gen'l Elec. Co.* v. *Int'l Union of Elec. Workers*, Case No. 413, This Term, the denial unfortunately increases a state of confusion initially occasioned by the Court of Appeals for the Seventh Circuit in the *Petroleum Workers* cases. For the reasons set forth below, we respectfully believe that a rehearing should be granted.

I.

THE COURT'S ACTION IN THIS CASE INEVITABLY COMPOUNDS THE CONFUSION SURROUNDING THE QUESTION OF THE ARBITRABILITY OF CONTRACTING-OUT DISPUTES.

This Court's decision in *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, was handed down on June 20, 1960. It is a fair characterization of its effect to say that, with the major exception of the Court of Appeals for the Seventh Circuit, it led to a widespread recognition that contracting-out disputes are arbitrable, absent an express exclusion. Not only the lower federal courts, but most certainly thousands of lawyers in the labor-management field as well, have viewed it as a key pronouncement and have adjusted their thinking to the admonition that "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause is quite broad." 363 U. S., at 584-85.

The first *Independent Petroleum Workers* case was decided on March 2, 1960, before *Warrior & Gulf*. No effort was made to seek review in this Court. The second decision, *Independent Petroleum Workers of America, Inc.* v. *American Oil Co.*, 324 F. 2d 903 (1963), was decided after *Warrior & Gulf*. Although the Court of Appeals for the Seventh Circuit determined that the grievance was not arbitrable, it is significant that the District Court, which held that it was, observed as follows (215 F. Supp. 1, 3):

> Moreover, that case [the earlier *Petroleum Workers* case] was decided prior to the decision of the Supreme Court in *Warrior*. In its holding the Court of Appeals relied very heavily upon the case of *United Steelworkers of America* v. *Warrior and Gulf Navigation Company*, 269 F. 2d 633 (1959), the decision of the Fifth Circuit which the Supreme Court subsequently

> reversed. Had *Warrior* been decided by the Supreme Court prior to *Independent Petroleum Workers* v. *Standard Oil Co.*, I think the outcome would have been different.

The very fact that the second *Petroleum Workers* case was affirmed by this Court by a four-to-four per curiam order is a strong indication that there is grave doubt as to whether the Court of Appeals or the District Court was correct in its view of the impact of *Warrior & Gulf*.

If one were to attempt to reconcile this Court's denial of certiorari in *Gen'l Elec. Co.* v. *Int'l Union of Elec. Workers*, with its evenly-divided decision in *Petroleum Workers*, one would be compelled to assert that by its action in the *General Electric* case this Court affirmed the principles of *Warrior & Gulf*, and that by its action in *Petroleum Workers* it upheld the collateral estoppel point relied on by the Seventh Circuit.

It is impossible, however, to fit the denial of certiorari in the instant case into this framework. One major reason is the circumstance that this case comes to this Court in a uniquely unsatisfactory state. Neither the District Court nor the Court of Appeals has announced a single valid or comprehensible reason why the dispute is not arbitrable. If, among other purposes, court decisions are meant to serve as guides for the future, it is painfully clear that here the courts have performed no such service.

On June 3, 1964, at the conclusion of oral argument, the Court of Appeals entered an order withholding further action in this case, pending this Court's decision in *Petroleum Workers*, on the ground that "[t]he issues herein are substantially the same as *certain* issues decided by this Court in *Independent Petroleum Workers* v. *American Oil Co.* . . ." (Emphasis added). On January 18, 1965, the Court below rendered a *per curiam* opinion, affirming the

District Court's judgment of dismissal on the basis of this Court's affirmance of the *Petroleum Workers* case, noting that "both parties concede that *the* issue here is substantially the same as that decided by this Court in *Independent Petroleum Workers of America* v. *American Oil Co.* . . ." Apparently, either the Court below had insight which most are not fortunate enough to possess or it elected to engage in speculation as to the grounds of this Court's decision in *Petroleum Workers*. In any event, the Court of Appeals was somehow able to discern that this Court's *per curiam* affirmance of *Petroleum Workers* was based on a resolution of "the same" issue as that in the present case, namely, the issue of the arbitrability of a contracting-out dispute. It apparently failed to recognize (or elected to disbelieve) that this Court's actions may have been based on the "collateral estoppel" issue, *an issue nowhere present in the instant case*. If, as seems most likely, this Court's affirmance did rest upon the collateral estoppel issue, the Court of Appeals could not properly rely on *Petroleum Workers* (as affirmed in this Court) as justification for what it did here.

It goes without saying that the Court of Appeals *did not rely* upon what the District Court determined in granting a motion to dismiss. Quite clearly, the Court of Appeals was of the view that the District Court's reasoning, quite apart from the result achieved, was not tenable. The District Court, after denying Petitioner's motion for summary judgment, dismissed the cause (App. 37). In its opinion (App. 34-37), it observed that the arbitrability of the grievance depended upon "whether the grievance falls within the clause 'pertaining to matters involved in this agreement' [in which event it would be arbitrable], or the clause "incident to the employment relationship,' " in which event it would not be arbitrable. In order to determine which clause applied, the District Court stated that it would

be necessary to hear evidence of the parties' intent. It avoided this necessity, however, by holding that the question of whether the grievance was arbitrable was itself an arbitrable issue, but that this question should have been raised by Petitioner by means of a separate grievance (App. 35-36). Thus the complaint was dismissed on the ground that Petitioner had failed "to exhaust its contractual remedies," *since it had failed to file a second, separate grievance raising the question of the arbitrability of the principal grievance.* The District Court stated that the second, subsidiary grievance "most definitely" would be arbitrable (App. 36).

As a guide for future labor-management relations, the District Court's "separate grievance" theory is as useless as is the Court of Appeals' *per curiam* affirmance. In short, then, neither the District Court nor the Court of Appeals has given a rational answer to the question: *Why is the grievance involved in the instant case not arbitrable?*

With all due deference to this Court, and to the courts below, Petitioner's counsel must admit to total bafflement. This case, together with the tragi-comedy in *Petroleum Workers*, inevitably leaves one in hopeless confusion. It would be far better for this Court to grant this Petition for a Writ of Certiorari and thereafter to affirm, *with a written opinion*, than to leave the issue where it now rests. At least, in that event, lawyers and courts would know what the law is. To know it now, with anything approaching confidence, is impossible.

II.

THE ACTION OF THIS COURT IN PETROLEUM WORKERS HAS ALREADY LED TO JUDICIAL SPECULATION THAT TRIAL COURTS SHOULD CONSIDER EXTRINSIC EVIDENCE OF BARGAINING HISTORY IN DETERMINING WHETHER A DISPUTE IS ARBITRABLE.

The Court of Appeals for the Seventh Circuit is not the only court that has seen fit to speculate as to what this Court was deciding when it affirmed the *Petroleum Workers* case. In *Torrington* v. *Metal Products Workers Union, Local 1645*, 237 F. Supp. 139 (D. Conn. Jan. 20, 1965), a District Court interpreted this Court's affirmance of *Petroleum Workers* as providing *an implied invitation to lower courts to receive evidence of bargaining history* on the issue of whether or not a certain industrial dispute has been excluded from the bargaining agreement. Obviously, whether or not this Court, by its four-to-four affirmance of *Petroleum Workers*, actually approved the fact-finding procedures alluded to in *Torrington* is a matter of conjecture. In view of this Court's denial of certiorari in *General Electric*, a case in which the lower court held that, in determining the arbitrability of a grievance, *a court may not consider extrinsic evidence for the purpose of determining the intent of the parties*, the District Court in *Torrington* may well have conjectured incorrectly. In any event, it is to be expected that lower courts will frequently engage in such speculation. The obvious, undesirable result is bound to be an increasing divergence of judicial opinion on the issue of arbitrability, accompanied by a substantial increase in litigation involving that issue.

If this Court desires to put a halt to speculation on the part of lower courts as to its position concerning the arbitrability of contracting-out grievances, we urge it to rehear and grant the Petition for a Writ of Certiorari in the in-

stant case. Without an explanation and reconciliation of *Petroleum Workers*, *General Electric*, and the instant case, the collective bargaining and arbitration processes may be governed by geographical boundaries rather than legal considerations. At present, contracting-out grievances will not be recognized as arbitrable, under usual contract language, in the geographical area of the Seventh Circuit. Elsewhere, however, they will probably go to arbitration with some regularity. It is difficult to understand why this should be so.

CONCLUSION.

We are mindful of the fact that rehearings are rarely granted. The unusual sequence of decisions and rulings referred to above, however, impels us to urge this Court *to decide* the instant case. A clear judicial pronouncement—*one way or the other*—would be far better than to leave unclarified the muddy results arrived at below.

Respectfully submitted,

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
DAVID R. KENTOFF,
Attorneys for Petitioner.

COTTON, WATT, ROCKLER & JONES,
105 West Adams Street,
Chicago, Illinois 60603.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....

Counsel for Petitioner.